

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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| In the Matter of |) | |
| |) | |
| Implementation of Section 309(j) |) | MM Docket No. 97-234 |
| of the Communications Act |) | |
| -- Competitive Bidding for Commercial |) | |
| Broadcast and Instructional Television |) | |
| Fixed Service Licenses |) | |
| |) | |
| Reexamination of the Policy |) | GC Docket No. 92-52 |
| Statement on Comparative |) | |
| Broadcast Hearings |) | |
| |) | |
| Proposals to Reform the Commission's |) | GEN Docket No. 90-264 |
| Comparative Hearing Process to |) | |
| Expedite the Resolution of Cases |) | |

COMMENTS OF LISA M. HARRIS

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COMMENTS OF LISA M. HARRIS

Lisa M. Harris, by counsel, hereby submits her comments in response to the *Notice of Proposed Rulemaking*, FCC 97-397, released November 26, 1997 ("*NPRM*") in the captioned proceeding.¹

SUMMARY

These Comments address the procedures the Commission should apply in pending comparative licensing cases (pre-July 1, 1997) for which a hearing has been held, the record has closed, and an Administrative Law Judge has issued an Initial Decision ("ID"). We demonstrate that, particularly where the ALJ has found that a duplicitous applicant intentionally prosecuted a sham integration plan, the hearing process has yielded a value which would be lost if the applicants were subsequently subjected to an auction. However, in the event the FCC

¹ 62 Fed. Reg. 65392 (Dec. 12, 1997).

nevertheless includes this class of applicants in the Treasury auctions process, we also show that the dissembling party (hereafter, the “Sham Applicant”) should not be eligible to participate. Such a rule follows straightforwardly from applicable principles that mark the bounds of proper agency action in this context. In particular, this rule will (1) further the FCC’s statutory duty to act in the public interest and to implement the new auction rules in a rational way; and (2) comport with due process considerations owed to applicants in pending proceedings.

I. THE RULES AS PROPOSED IN THE NPRM.

1. *Scope of Section 309(l); Pre-July 1, 1997 Applications.* In the *NPRM*, the Commission tentatively proposes to use auctions to resolve pending initial licensing proceedings that are within the scope of 47 U.S.C. § 309(l). However, at Paragraph 22 of the *NPRM*, the FCC countenances a “subset” of such applications which had “progressed to either an Initial Decision by an ALJ or a decision by the former Review Board, before the court found in *Bechtel II* that the integration criterion used by the Commission was unlawful.” The *NPRM* invites comment as to whether, considering “the resources these applicants have expended, as well as the delays they have encountered,” auctions would be inappropriate.

In the event the Commission were to use auctions even in these cases, new Section 309(l) provides that “the Commission shall . . . (2) treat the persons filing such applications [i.e. competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997] as *the only persons eligible to be qualified bidders.*” *NPRM* at ¶ 23 (emphasis added).

In the same section (¶¶ 23 - 35) the FCC considers “Rules and Procedures for Pending Comparative Licensing Cases,” including “cases already designated for hearing.” Where (i) a

settlement is not filed, and (ii) the auction rules have become final, the Commission proposes that

[T]he ALJ (or the General Counsel on delegated authority in cases pending before the Commission) would issue an order directing that the permittee is to be determined by comparative bidding procedures from among the pending applicants *eligible to participate* in the auction, and indicating *whether there are any unresolved questions as to a particular applicant's basic qualifications*. If not, the hearing proceeding would be terminated. In the event questions remain with respect to an applicant, the hearing will be resumed in the event that applicant is the winning bidder after the auction. . . . We recognize that deferring questions as to the pending applicants' basic qualifications may require that we conduct a second auction if the high bidder is ultimately found disqualified, and that there are few remaining hearing cases. Thus, we seek comment on whether it would be *more efficient to review the basic qualifications of the pending applicants prior to the auction*."

NPRM at ¶ 30 (emphasis added).

2. *Illustrative Case.* A case that illustrates the unique status of this "subset" of pre-July 1, 1997 applications is the Clarksville, Indiana FM proceeding, one of the "remaining hearing cases" referred to in the *NPRM*. *Ibid.* In this case, Clarksville Broadcasting Ltd. Partnership ("CBLP") falsely depicted itself as a *bona fide* limited partnership. Joyce Jones, an African American female, was put forward as the sole general partner proposed for full integration into the management of the station.

In deposition testimony and at trial, the truth emerged. CBLP's principals had lied repeatedly about various decisional matters relating to the extent of Jones' actual involvement in the preparation, prosecution, and financial arrangements of the applicant. In fact, the record of Ms. Jones' hearing testimony is replete with contradictions and fabrications that destroyed any confidence in her promise to control the station.²

² No less than 13 instances of perjury by Jones came to light at the hearing. As just one example, Jones testified that she met with CBLP's new banker while a February 28,

Not surprisingly, the ALJ roundly rejected CBLP's integration plan as proposed in its direct case.

The *conclusion is inescapable* that the CBLP application was prepared and chiefly prosecuted by its purported limited partners. . . . They approached Ms. Jones who accepted without any negotiations the percentage of equity offered to her. Ms. Jones was not required to do anything to secure the financing for either the prosecution of the application or the necessary loan commitment. She was *so disengaged from the entire process* that she did not even discuss financial matters affecting the station with Mr. LeGette [a purportedly passive limited partner], and lacked any knowledge of what Mr. LeGette told the banker with respect to her role at the station, or, indeed, what was told to the banker in order to secure the loan commitment. Furthermore, she had no knowledge of Mr. LeGette's financial status and, apparently little interest, although he had assumed full responsibility for securing the loan and for meeting the costs of prosecuting the application, and she was never asked for her own resume or financial statement. Once the loan commitment was made, Ms. Jones made no effort to learn the amount of the loan, and she never asked anyone to tell her the amount of the loan. As soon as the application was filed, Mr. LeGette all but ignored Ms. Jones for almost a year until the negotiations began with [new limited partner] YBCK, again at the instigation of Mr. LeGette. Throughout the course of the prosecution of this application, Ms. Jones' only concern was to protect the amount of her equity interest and her position as General Manager. This *total lack of any meaningful involvement on the part of Ms. Jones*, either by her own design or by the wishes of her limited partners, both of which appear to the case here, persuades the Presiding Judge that Ms. Jones will not be in full control of the station, with sole responsibility for its management.

Initial Decision, FCC 93D-3, released February 10, 1993, at ¶ 52 (emphasis added) (record citations omitted).

1991 loan letter to CBLP was being negotiated. She averred that she introduced herself to the bank officer on her own in February 1991 to open a bank account. However, when she was confronted with her deposition testimony that the bank account was actually opened the following month, Jones brazenly blamed her counsel for her own false testimony. She stated that he had told her to suggest that the meeting with the bank officer came before the amendment supplying the loan letter. See Exceptions and Supporting Brief of Lisa M. Harris, filed in MM Docket 91-98 April 26, 1993, at 14.

3. These findings reflect a systematic plan by CBLP's principals to deceive the FCC. Joyce Jones -- possessing the necessary minority and gender enhancements -- was nothing more than an expedient used by the actual controlling partners in an effort to trick the FCC into granting the CBLP application. The case is thus an excellent illustration of a virtue of the hearing process -- the exposure of a Sham Applicant. As we show in Section II, where the hearing has "done its work" by yielding decisional information about parties that have shown themselves ineligible to be FCC licensees, it would be senseless for the FCC to ignore this history by sending these applicants to auction. Nonetheless, even if auctions were applied to the subset of comparative cases, we show in Section III that the FCC should adopt a rule that a Sham Applicant such as CBLP is not eligible to participate.

II. THE BENEFITS OF HEARINGS ALREADY HELD SHOULD BE PRESERVED.

Where a comparative hearing has been held already -- and particularly where one of the parties has demonstrated itself to be a Sham Applicant -- it is clear that the hearing process has performed a valuable function. For, regardless what comparative criteria (if any) the Commission were to apply to this subset of pre-July 1, 1997 applicants, in no event should a Sham Applicant be allowed to acquire an FCC license. The key characteristic of licensee truthfulness and reliability must remain in place regardless of the rules the *NPRM* ultimately spawns.

In all cases where a hearing has actually been held, substantial resources have been expended, both by the applicants and by the FCC. Mrs. Harris has literally devoted years of time and many thousands of dollars to her dream of owning and operating her own radio station in the area where she has lived all her life. The process of sifting through the comparative qualifications of the competing applicants in terms of their proposals for direct participation by

ownership in the management of the station may not in all respects have been a perfect system. Nevertheless, it was the system that the FCC imposed, and it was successful in revealing which would-be broadcasters were willing to dissemble in order to secure a construction permit.

It would be fundamentally unfair for the FCC to subject Mrs. Harris and others like her to an auction when they have already expended hundreds of hours and hundreds of thousands of dollars over the course of a period of ten years or more participating in a system ordained by the Commission.

The third remaining applicant for the Clarksville frequency is Kentuckiana Radio Partners ("KRP"), a general partnership of six individuals, four of whom proposed to be integrated into the operation of the Clarksville radio station. However, KRP, like CBLP, lacks the basic qualifications to be a Commission licensee. Martha Sue Anderson, one of KRP's partners, at her 1991 deposition, testified that she had decided not to fulfill her integration commitment. While the candor of that partner was laudable, the subsequent conduct of the partnership was not.

Even though KRP had a duty under Section 1.65 of the Commission's rules to advise the Commission of this fundamental change in its proposal, it never did so. Instead, it continued to represent to the agency that Mrs. Anderson would be integrated into the operation of the radio station. KRP was never a viable applicant in comparative terms in any event, so the ALJ did not call for hearing testimony from the KRP partners. However, the applicant's willingness to conceal this material change in information it had filed with the agency precludes a grant of the KRP application. Accordingly, applicants like KRP that have demonstrated their lack of basic qualifications to be a Commission licensee should not be allowed to participate at any Treasury auction.

In this regard, the time and effort already expended on the searching examination of KRP's proposal would be wasted if it were allowed to bid at a Treasury auction.

Considering these factors and that, as illustrated by the Clarksville case, the "crucible" of the hearing process yielded critical information that logically bears on the eligibility of certain applicants to hold a license, it is unnecessary for the FCC to subject the other applicants to an auction.

Mrs. Harris has urged the retention of the comparative criteria in comments she submitted in GC Docket 92-52. As argued there, a judicially-sustainable formulation of the criteria can be created. But whatever approach the Commission were to fashion as applicable to the subset of cases under discussion here, the Clarksville proceeding and others like it have proceeded too far to subject the applicants to an auction.

By this, we mean not only that the equities favor retention of a comparative schema as to these applicants, but -- more fundamentally -- prudential considerations dictate this result. The FCC will most effectively promote the public interest by taking advantage of *the value* the hearing in this case has created. Indeed, to ignore that value would be capricious.

In the event the FCC concludes, however, that this subset of applicants should nonetheless be sent to auctions, we show in Section III that Sham Applicants should be deemed ineligible to participate.

III. SHAM APPLICANTS SHOULD NOT BE PERMITTED TO PARTICIPATE IN AN AUCTION.

Adoption of a rule that precludes a Sham Applicant from auction participation is appropriate for two reasons: (A) such a rule will further the FCC's statutory duty to advance the public interest and implement new Section 309(l) in a rational way; and (B) the rule will

comport with all requirements of due process.

**A. A Rule of Ineligibility Will Further the Public Interest
And Will Be Rational.**

1. *Public Interest Considerations.* The “paramount” interest in administrative proceedings is that of the public, and the “interests of private litigants must give way to the realization of public purposes.” *Virginia Petroleum Jobbers Ass’n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). Matters of licensee character and truthfulness are at the heart of the FCC’s regulatory duty to protect the public interest. *See, e.g., Richardson Broadcast Group*, 7 FCC Rcd 1583 (1992) (subsequent history omitted) (“It is well settled that the ability of the Commission to rely on representations of applicants and licensees is crucial to the functioning of our regulatory process”); *Character Policy Statement*, 102 FCC 2d 1179, 1210 (1986) (subsequent history omitted) (Applicant truthfulness affects integrity of Commission’s regulatory process).

“[T]he trait of ‘truthfulness’ is one of the . . . key elements of character necessary to operate a broadcast station in the public interest,” and the Commission may “treat even the most insignificant misrepresentations as disqualifying.” *Id.* at _____. *See also Emission de Radio Balmeseda, Inc.* 7 FCC Rcd 3852, 3858 (Rev. Bd.), *rev. denied*, 8 FCC Rcd 4335 (1993) (“The Commission’s demand for absolute candor is itself all but absolute.” The Commission recently reiterated that even the failure to disclose required information, or provide “incomplete or incorrect information,” can “raise a serious question as to whether the applicant possesses the character qualifications to be a Commission licensee.” *Liability of KCTZ Communications, Inc.*, DA 97-2320, released November 6, 1997 (MMB), *citing Policy Statement*, at 1210-11.

Obviously, the nexus between licensee truthfulness and the public interest would be broken if a Sham Applicant were deemed eligible to participate in an auction. Thus, there cannot be any genuine dispute that the Rule of Ineligibility would serve the public interest by promoting the long-settled principles discussed above.

The public interest would be served in another way. The Congress as well as the FCC have repeatedly determined that a virtue of auctions is more rapid delivery of new service to the public, one of the FCC's principal statutory objectives. *See, e.g., Marlin Broadcasting* [CITE] ("objective of providing communications service to the public in the most efficient, expeditious manner possible" carries substantial weight in balancing analysis); *Sutton v. City of Milwaukee*, 672 F.2d 644, 645-46 (7th Cir. 1982). If a Sham Applicant were allowed to participate in an auction, however, this objective would be undermined, as we discuss in detail *infra*.

Moreover, the FCC's general competitive bidding rules provide that if the winning bidder is ultimately found to be unqualified to be a licensee, the Commission would conduct another auction for the license and this would require that it afford *new parties* an opportunity to file applications for the license. *See* 47 C.F.R. § 1.2109(c); NPRM at ¶ 69. This would be egregiously prejudicial to the other parties in any such case.

For a decade, Mrs. Harris has served as a "private attorney general," as it were, bringing to the attention of the Commission important information about the other applicants for the Clarksville channel. All but three of the original host of applicants have either dismissed their applications unilaterally or have settled with Mrs. Harris. To open the doors of this case to all and sundry would make a mockery of the FCC's own "cut-off" procedures, and would violate Mrs. Harris' due process rights. In order to avoid the quagmire of that issue, the Commission

should both preclude Sham Applicants from auction participation, and should limit any re-auction (if auctions are to be held at all) to the class of applicants who filed acceptable applications on or before a cut-off date issued before July 1, 1997.

2. *Rationality.* There can be little question that a rule precluding a Sham Applicant from auction participation would satisfy the requirements of rationality. Defining the class of eligible auction participants by, *inter alia*, excluding a Sham Applicant, is reasonably related to the FCC's statutorily-imposed duty to act in the public interest.

Again, the Clarksville case illustrates this point clearly. An extensive and thorough hearing produced compelling evidence that CBLP's principals lied in an ill-fated scheme to influence the outcome of the proceeding. The ALJ's findings were based, among other things, on his observations of CBLP's principals at trial. Moreover, if challenged on appeal, the ALJ's evidentiary findings will be entitled to special deference since they come from the "trier of fact who saw and heard the witnesses testify." *See Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Gateway Broadcasting Enterprises, Inc.*, 58 FCC 2d 63, 66 (1976); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 840 (Rev. Bd. 1981).

Where, as here, the ALJ's conclusions were based primarily upon supportable findings of witness credibility, and where there is "substantial evidence supporting each result," *see Greater Boston Television Corp. v. FCC*, 444 F.2d at 853, a reviewing forum affords "nearly conclusive deference to [the ALJ's] . . . conclusion." *See also California Broadcasting Corp.*, 2 FCC Rcd 4175-4176 (Rev. Bd. 1987)(and cases cited therein).

The Rule of Ineligibility would thus pass judicial review under such governing precedents as *NLRB v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987) (agency given deference

“as long as its interpretation is rational and consistent with statute”); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (agency regulations given deference “unless they are arbitrary, capricious, or manifestly contrary to the statute”); *see also E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107 (198). Because Congress suggested that only “qualified” applicants participate at any auction, but did not specifically address the matter of the eligibility of parties we have here defined as “Sham Applicants,” the FCC has substantial latitude to promulgate a reasonable rule. *See Smiley v. Citibank, N.A.*, 116 S.Ct. 1730, 1733 (1996).

Because the Rule of Ineligibility would promote the public interest and at the same time satisfy the requirements of rationality, it should be adopted unless there were a countervailing concern that a Sham Applicant’s due process rights would be compromised if it were denied the privilege to participate in an auction. As shown below, no such concern arises.

B. Due Process Considerations.

Under the familiar test of *Mathews v. Eldridge*, the question of whether a rule denying a Sham Applicant the privilege of participating in an auction turns on (1) the nature of the private interest at stake and the risk of an erroneous deprivation of that interest through the procedure used; and (2) the nature of the Government’s interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

1. *The Nature of a Sham Applicant’s interest in participating in an auction and the risk of deprivation of any such interest by adoption of the Rule of Ineligibility.* Here, of course, the threshold question is whether a Sham Applicant has *any* cognizable interest that requires special protection.

As a Sham Applicant comes to the Commission with unclean hands, it clearly does not. In addition, it should be noted that the all parties who filed applications before 1997 had no expectation that the award of the subject licenses would be made based on an auction process.

In any event, as the FCC correctly observes in the *NPRM*, its authority to adopt a new rule does not depend on an applicant's expectations, but on whether the rule is arbitrary or capricious. *See NPRM* at ¶ 14, citing *DIRECTV v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997). *See also*, our previous discussion in Section II(A)(2), *supra*. Thus, a Sham Applicant would not have a viable due process claim that a constitutionally-protected interest lay in its expectation of the ability to participate in the auction.

Moreover, considering the nature of the findings made by the ALJ in the Initial Decision in the Clarksville case, which bear so fundamentally on the truthfulness and reliability of CBLP, it strains reason to think that such conduct would *eo ipso* render it ineligible for participation in the auction. Of course, there is always the theoretical possibility that CBLP could successfully appeal the ALJ's adverse findings. But this does not in any way enlarge CBLP's interest, for two reasons.

First, as discussed above, ALJ's findings on matters of witness credibility are rarely overturned, so the risk of a subsequent determination that CBLP's interest, even if one existed, had been deprived erroneously, is very remote. Second, it is well established that whatever the outcome of a Clarksville auction, that outcome is subject to judicial review. Thus, CBLP is adequately protected. *See, e.g., Auction of IVDS Licenses*, 6 CR 134 (Wireless. Bur. 1997) (licenses awarded at re-auction would be, as a matter of law, subject to the outcome of court cases); *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 735-36 (D.C. Cir. 1976) (grant of

licenses are subject to judicial review and obligation of FCC to give effect to court's judgment).

2. *The Countervailing Interest of the Government.* Permitting a Sham Applicant to participate in an auction would plainly violate the governmental interest in licensing broadcast facilities to parties who can be relied upon to be truthful with the agency that regulates them. Beyond this key factor, allowing the participation of a Sham Applicant virtually guarantees unnecessary delay in the advent of the new broadcast service to the public. A tainted applicant, if it were the high bidder at the auction, obviously could not proceed to become a licensee without *some manner* of additional inquiry into the applicant's character qualifications. That procedure, even if it were defensible on other grounds (and we cannot imagine what such grounds would be) would cause delays that the Rule of Ineligibility would avoid.

IV. PRE-BECHTEL CASES SHOULD BE RESOLVED ON A COMPARATIVE BASIS.

At Paragraph 21 of the *NPRM*, the Commission invites comment as to the continued viability of comparative hearings for pending applications, in light of the D.C. Circuit's ruling in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) (*Bechtel II*), that the integration preference, as it evolved in the FCC's jurisprudence, is not judicially tenable. The court of appeals, of course, did not reject in principle the notion that *some* set of criteria for selecting among competing applicants in a hearing would pass muster; only that the FCC had thus far failed to show that the current standard is empirically defensible.

This raises two questions: (1) the availability of evidence supporting retention of the current integration standard; and (2) if that standard is abandoned, what factors should be applied if hearings are held for pending, pre-July 1, 1997 applications, and especially for the subset of applications for which hearings had been held prior to the second *Bechtel* remand.

With respect to empirical evidence validating the integration test, Harris has previously submitted comments citing a variety of cases in which the integration of owners into management has had a salutary effect on the operation of the station. In the *NPRM*, the FCC dismisses this type of evidence as “anecdotal,” *NPRM* n. 14, and thus (apparently) unhelpful. We disagree. Agency judgments about the dynamics of their policies in the industries they regulate, are often based on pragmatic evaluations that are a product of the agency’s substantial expertise in that industry. Those policies need not necessarily be a product of laboratory-type analyses in order to be judicially sustainable, particularly given the deference courts are obliged to give to agency promulgation of rules. This principle applies in the instant context. Thus, to dismiss as “anecdotal” evidence of the sort Harris and other applicants have previously submitted as favoring a modified version of the present integration test, is a mistake. Indeed, the Court’s remand in *Bechtel* came in response to the recital by Mrs. Bechtel of several instances in which broadcast permittees (most if not all of whom lacked substantial broadcast experience) failed to fulfill their commitments. In response, the FCC neglected to show that these situations were atypical, or to change its rules so as to guard against abuses. Consistent with the Court’s opinion, the Commission can adopt a new comparative standard that incorporates such features as broadcast experience, local residence, and civic involvement as appropriate preferences for differentiating among competing applicants.

In any event, should the FCC decide that a more universal survey of the real-world consequences of various comparative criteria were necessary, it plainly has the capability to develop that record. It has done so frequently in the recent past. For instance, in the proceeding in which the Commission considered the permissibility of LMAs, licensees were required to

respond to a survey designed to gather pertinent data. If the FCC did the same thing in this context -- where the stakes are arguably much higher -- the evidence would show that there is a rationality to at least a modified version of its comparative criteria which can be empirically verified.

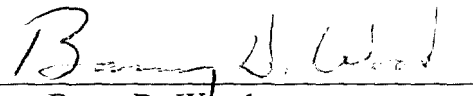
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V. CONCLUSION

For the foregoing reasons, we urge the Commission to incorporate into its new rules the recommendations advanced herein.

Respectfully submitted,

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